(1)

Supreme Court, U.S.
FILED

JUN 26 2003

No. 03-344

IN THE

Supreme Court of the United States

M. ROBERT ULLMAN,

Petitioner

v.

UNITED STATES OF AMERICA

On Petition For Writ of Certiorari
To The United States District Court
for the Eastern District of Pennsylvania
and
The U. S. Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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23 pp

THE QUESTION PRESENTED FOR REVIEW

Did the Motion by the United States of America, for Summary Judgment (Fed. R. Civ. P 56 (c)), citing lack of "A Genuine Issue as to any Material Fact" in the case of United States of America vs. M. Robert Ullman, and the ruling by the U.S. District Court in granting that Summary Judgment Motion, violate Ullman's right to a jury trial as guaranteed by the Amendment VII (the Bill of Rights) of the U. S. Constitution?

Does the Court concur with the Scintilla of Evidence Rule that states: If even the slightest amount of relevant and substantial evidence favors the non-movant in a Motion for Summary Judgment, the motion cannot be granted and the factual issue must go to the jury ?

Does the Court agree that the non-moving party (M. Robert Ullman) has every right to offer substantial, material and relevant facts and evidence in opposition to the United States Motion for Summary Judgment and that these facts should be considered by the court?

Does the court agree that if the lower courts, in their written opinion, copy word for word the position of the moving party (United States) and reject every bit of fact and substantial and compelling evidence presented by the non-moving party, a ruling that should have been left to a jury, the Court violated the Constitutional rights (a right to a jury trial) of M. Robert Ullman.

LIST OF ALL PARTIES TO THE PROCEEDINGS

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CITATION OF OFFICIAL OPINIONS

May 8, 2002 - United States District Court for the Eastern District of Pennsylvania - Judge Ronald L. Buckwalter:

"The United States Motion for Summary Judgment on Defendant's (Ullman) counterclaim pursuant to 26 U.S.C. #7433 alleging that the IRS engaged in unauthorized collection activities is granted and Defendant's counterclaim is dismissed.

Civ. No. 01 -CV 00272

June 13, 2002 - United States District Court for the Eastern District of Pennsylvania Judge Ronald L. Buckwalter:

"Upon consideration of Defendant's Motion for Reconsideration of order entered May 8, 2002, it is hereby ordered that Defendant's motion is denied.

Judgment is entered in favor of Plaintiff and against Defendant.

Civ. No. 01-CV00272

January 28, 2003 - United States Court of Appeals for the Third Circuit - Circuit Judges Nygaard, Greenberg, Cowen:

"Ordered and adjudged by this court that the judgment of the District Court entered on June 13, 2002 be, and the same is affirmed."

No. 02 -2752

April 14, 2003 - United States Court of Appeals for the Third Circuit - Judge Nygaard

"The Petition for Rehearing filed by the Appellant (Ullman) in the above-entitled matter, having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for a rehearing, the Petition for Rehearing is hereby denied. It is so ordered."

No. 02-2752

STATEMENT OF BASIS FOR JURISDICTION

1. April 14, 2003 - United States Court of Appeals denied the Appellant's Motion for Rehearing of the January 28, 2002 ruling by the U. S. Court of Appeals which affirmed the May 9, 2002 order of the U. S. District Court for the Eastern District of Pennsylvania and its subsequent judgment entered on June 13, 2002.

2. The Petitioner, M. Robert Ullman, is requesting the U. S. Supreme Court to examine a fundamental question of law as it pertains to the (seventh) VII Amendment to the U. S. Constitution, the right to a jury trial.

The lower courts granted the United States of America a Motion for Summary Judgment pursuant to Rule 56 (c), which states:

"(c) The judgment sought shall be rendered forthwith if the pleading, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Thus the matter to c onsider is the "GENUINE ISSUES OF MATERIAL FACT".

"In the Law of Summary Judgment, a Genuine Issue of Material Fact is a triable, substantial of real question of fact supported by substantial evidence.

Substantial Evidence is evidence that a reasonable mind might accept as adequate to support a conclusion, evidence beyond a scintilla.

"Scintilla of Evidence Rule" - a common law doctrine holding that if even the slightest amount of relevant and

substantial evidence favors the non-movant in a motion for Summary Judgment or for a direct verdict, the motion cannot be granted and the factual issues must go to the jury."

The Petitioner argues that the facts in this case show that there are Genuine Issues of Material Fact that were provided by the Petitioner in his answer to the United States Motion for Summary Judgment and likewise in his counter motion for Summary Judgment.

That "material fact" is essential to the entire case and it centers upon the evidence supplied by Ullman in regards to 26, U.S.C. 6159 - "Installment Agreement".

"The non-movant's allegations must be taken as true, and when these assertions conflict with those of the mover, the former must receive the benefit of doubt." Goodman v. Meade Johnson & Co. 534 F 2d 566, 573 (3rd Cir. 1976)

The courts disregarded this issue of "material fact" and thus violated Ullman's right to a jury trial as guaranteed in Amendment VII of the U. S. Constitution.

Only the U. S. Supreme Court can make a final ruling in "material fact" and Amendment VII of the U. S. Constitution as it applies to Summary Judgment.

CONSTITUTIONAL PROVISIONS

AMENDMENT VII - BILL OF RIGHTS

In suits at Common Law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

Summary Judgment is only a procedure for promptly disposing of actions in which there is no genuine issue as to material fact. In the law of Summary Judgment, a genuine issue of material fact is a triable, substantial of real question of fact supported by substantial evidence.

A STATEMENT OF THE CASE

In the case of United States of America (Plaintiff) v. M. Robert Ullman (Defendant) #01-0272 and its Motion for Summary Judgment and Defendant's counterclaim pursuant to 26 USC #7433 alleging that the Internal Revenue Service intentionally, recklessly or negligently violated the Internal Revenue Code in collecting taxes allegedly owed by him. Defendant, a pro se litigant, also moved for Summary Judgment on his counterclaim; the United States District Court for the Eastern District of Pennsylvania **granted** the United States Motion for Summary Judgment and denied the Defendant's Motion for Summary Judgment.

The United States Court of Appeals for the Third Circuit (#02-0752) reaffirmed the District Court decision.

The United States of America made a motion for Summary Judgment pursuant to Rule 56c of the Federal Rules of Civil Procedure arguing that "a court shall grant Summary Judgment if the pleadings, together with the evidence in the case, show that there **is no genuine issue of any material fact** and that the moving party is entitled to judgment as a matter of law Fed. R. Civ. 56c.

The United States of America initiated their action, but provided no evidence or testimony to support the motion.

The Defendant, M. Robert Ullman, in response to the United States Motion for Summary Judgment and his own Motion for Summary Judgment, offered facts and substantial evidence to support his response and his counterclaim.

The U. S. District Court issued their opinion by stating "... a Motion for Summary Judgment shall be granted if the court determines that 'there is no genuine issue as to any material

fact and that the moving party is entitled to judgment as a matter of law.'"

In their decision, the District Court and the Court of Appeals **copied**, almost word for word, the argument as presented by the United States.

Thus, it stands to reason that there cannot be any genuine issue of material fact if the court accepts all the arguments of the United States to be true and all of the facts and evidence submitted by the defendant, M. Robert Ullman, as not relevant or even slightly substantial; then the Court, by their action and opinions, violated the Defendant's right to trial by jury.

REASON FOR GRANTING WRIT

The U. S. District Court and U. S. Court of Appeals have decided a Motion for Summary Judgment introduced by the Plaintiff (United States of America) in favor of the United States of America. Such action prohibits the Defend-ant, M. Robert Ullman, from exercising his constitutional rights to jury trial (the Seventh Amendment) and this action violated the due process clause (the Fifth Amendment).

The United States of America initiated this proceeding by filing a one-count complaint to reduce a tax assessment to judgment against M. Robert Ullman.

M. Robert Ullman answered the complaint and filed a counterclaim against the United States for unlawful collection activity pursuant to 26 USC 7433.

The United States of America filed a Motion for Summary Judgment and Ullman answered the complaint stating: "The United States Motion for Summary Judgment and its Memorandum in support of that motion is so full of factual errors that were it not for the name M. Robert Ullman that appears on the heading, it would be difficult to recognize that the Department of Justice is filing a motion for Summary Judgment in the same Civil Case No. 01-cv-272. Exhibit E in the Appendix points out the errors.

By approving the Plaintiff's (United States of America) Motion for Summary Judgment, the court violated the due process clause of the Fifth Amendment which prohibits the government from unfairly or arbitrarily depriving a person of property.

The Summary Judgment motion by a Plaintiff, the United States of America, can be granted only if there is "no genuine issue of material fact". The word "no" means "in no

uncertain terms, or not any".

Allowing the United States of America, acting as the Plaintiff, to file a Motion for Summary Judgment and granting such motion by the court, allows the United States of America (our government) to be the judge, the jury and to be omnipotent or almighty, having virtually unlimited authority or influence.

The court should recognize the difference between the United States of America, acting as the plaintiff in a civil case and filing a Motion for Summary Judgment and that of a citizen, a plaintiff or defendant filing a Motion for Summary Judgment because a citizen does not have the power (financial or political) to gain the same results. A Pro Se Defendant, one who cannot afford an attorney who has "tax" experience, is extremely disadvantaged.

M. Robert Ullman respectfully requests the court to correct this disadvantage by restricting the rights of the United States of America acting in its capacity as a plaintiff in filing Motion for Summary Judgment.

Partial excerpts from documents entered in the court record show, pursuant to Rule 56 of the Federal Rule of Civil Procedure, that Genuine Issues of Material Fact did exist and that the moving party (United States) was not entitled to Judgment as a matter of law.

Summary Judgment Rule 56 states: "If there is no genuine issue of material fact the moving party is entitled to judgment as a matter of law." ("No" means not any)

A material fact is a fact that is significant or essential to the issues at hand.

The existing material facts at issue are:

1. 433D Agreement signed Jan. 25, 1985

   a. "Amount owed as of Jan. 25, 1995 - $1,627,884.69"

   b. "Earliest CSED Oct. 23, 1999"

   c. "Conditions of this agreement
   "This agreement is based upon your current financial circumstances. It is subject to revisions or termination if subsequent financial information required by the IRS reflects a change in your ability to pay ."

   d. "Additional condition: Agreement will be re-evaluated on or about Jan. 26, 1997."

2. Letter from District Director, IRS to M. Robert Ullman Jan. 6, 1998:

   "We would like to advise you of your current status of these penalties. The collection statute of limitations on the Trust Fund Recovery Penalty assessed in the amount of $952,000 will expire on October 23, 1999 while the statute on the penalty that was assessed in the amount of $80,430.47 is scheduled to expire February 4, 2001. Unless you voluntarily extend the collection statutes of limitation for each penalty or the statutes are extended as a matter of law, e.g. the filing of an offer in compromise, a bankruptcy petition, certain types of law suits, etc. or a change in the law, we will not attempt collection beyond the respective expiration date."

3. "Congressional History Sheet" Nov. 20, 1994 - Excerpts from notes of Antonio Cruz, Manager of the IRS in Reading, Pa., obtained thru an F.O.I. Request:

   "Our private opinion is that he (Ullman) cannot win the

suit (against Meridian) unless Meridian settles."

4. Notes of IRS Agent Eugene Clarke - Jan. 25, 1995, obtained thru a F.O.I. Request:

   "Trust Fund Recovery penalty assessments have been made against M. Robert Ullman in the amounts of $952,010.88 and $80,430.47 on October 23, 1999 and Feb. 4, 1991 respectively. Mr. Ullman has entered into an installment agreement and is paying $600.00 per month on the liabilities. There is no potential for full payment from Mr. Ullman other than from the action described in Item 6" (Ullman action against Meridian Bank).

5. Letter from Attorney Jack A. Linton, LLM Taxation, dated October 4, 2002. Attorney Linton represented M. Robert Ullman during 1993 and 1994 and was the attorney who negotiated a payment agreement with agent Eugene Clarke.

   "We discussed the 1994 installment payment agreement which I had attempted to negotiate on your behalf with Revenue Agent Eugene Clark of the Internal Revenue Service. At that time you were actively pursuing your claim against Meridian Bank and expressed guarded optimism with respect to your ability to either collect the claim or effectuate a large settlement with Meridian Bank. Because of that possibility and because a number of your earlier Offers in Compromise had been rejected by the Service, we entered into good faith negotiations with the Service and had arranged an agreement with Mr. Clark at $400.00 per month to be reviewed at the end of one year based upon your concerns about possible reductions in your pension payments. The agreement was rejected at that time, i.e. when we were together with Mr. Clark or shortly thereafter because of the conditions which you set forth in the offer, i.e. I am not admitting responsibility for

the tax debt. This was subsequently followed up by an additional reason for rejection, i.e. the Service's determination that your expenses were excessive. There is no doubt that all concerned were aware that this was a stop-gap agreement pending the outcome of your litigation with Meridian Bank since based upon both your income and the monthly payments that you would be making there was no reasonable possibility of the liability asserted by the Internal Revenue Service being paid in full.

"The foregoing is my recollection for what occurred in that brief span of time during the fall of 1994."

6. Notes of IRS Problem Resolution Officer Louis Romito (obtained thru a F.O.I. Request):

April 10, 2000 - "Received a fax from TP addressed to Bucci (agent) and me. I transmitted my letter of 3/20/99 in which I stated a 433D resembles a contract. I also transmitted a letter from PBGC outlining the terms of repayment for his overpaid pension. PBGC (Pennsion Benefit Guarantee Corp.) was to reduce TP's pension from $1,016 to $641 - adrop of $375, which includes a 10% reduction to cover $40K he owes them (overpayment). Ullman's logic is that his monthly payment to cover the IRS should be reduced by the amount of his pension reduction. I called Bucci to outline the options as I saw them."

"Accept Ullman's proposal at face value. The COSED will expire in Feb. 2001. It may be unfair to the TP and counter productive for the govt. to hold the line, perhaps extending the statute, and litigate for $4,500 we would not realize on a $200,000 debt we will write off in 11 months.

"Accept Ullman's proposal to consider the reduction generated by PBGC but ..." (balance of statement not included).

7. Letter from Louis Romito - Problem Resolution Officer, IRS, dated March 29, 1999:

"As the Taxpayer Advocate with oversight responsibility for the processing of SFC inquiries made by Pennsylvania Taxpayer, I conducted a review of your concern. My approach was to look at the basic issue. I did that and came to the following conclusion: As you note, the language of the (433D) agreement states, "agreement is based upon your current financial circumstance. it is subject to revision or termination IF subsequent financial information required by the IRS reflects a change in your ability to pay ...(emphasis added). Your installment agreement does not meet the legal standard of a contract. However, I agree with you that it is sufficiently contract-like that both parties to the agreement are bound by its terms as though it was a contract."

8. Memorandum (by the United States) in support of United States Second Motion for Summary Judgment February 11, 2002:

"The Installment Agreement (433D) is not a contract. Contract law principles are inapplicable in this case because a written installment agreement pursuant to 26 U.S.C. #6159 is not a contract ... because written installment agreements are creatures of statute and designed to accommodate taxpayers who are unable to pay the balance of their tax liability in lump sum." "Such a written installment agreement allows the taxpayer to satisfy a tax liability by making scheduled periodic payments until the liability is paid in full."

9. Memorandum - Judge J. Buckwalter, U. S. District Court for Eastern District of Pennsylvania - May 8, 2002:

"It was only because of the pre-existing tax liability and

the assumption that a monthly payment arrangement would facilitate the collection process that the IRS agreed to accommodate Ullman and allow for payment of the assessment on an installment basis."

"Thus although an agreement in the general sense, the installment agreement is not a contract in the sense that breach of its terms give rise to a common law breach of contract action because of the absence of consideration on the part of Ullman."

"Pursuant to the installment agreement, the IRS allowed Ullman to satisfy his pre-existing tax liability over time."

9. Note: It was impossible for a $600.00 per month payment beginning on Jan. 25, 1995 and ending on Feb. 5, 2001 to pay a debt of $1,627,884 in full. The assessment was increasing by $66,000 per year (interest).

SUMMARY OF FACTS

The United States initiated the proceeding on January 18, 2001 by filing a one-count complaint to reduce a tax assessment to judgment against M. Robert Ullman for unpaid tax liability. Defendant's tax liability stems from a Trust Fund recovery penalty assessment resulting from a determination that he was the responsible person for the non-payment of employees' withholding taxes by Canoe Manufacturing Co. Inc. (company was liquidated in 1992 by the U. S. Bankruptcy Trustee). Ullman was the majority stockholder.

The tax liability was for:

Tax period ending Dec. 31, 1988 - $950,256.88, assessment date Oct. 23,1989

Tax period ending June 30, 1989 - $80,444.47, assessment date Feb. 4,1991. (The initial assessment was incorrectly made against the Chapter 7 Trustee, thus increasing the final assessment date.) (On September 18, 2000 the IRS discovered an error in the Feb. 4,1991 assessment and changed the amount to $45,651.51.)

The total due (for both assessments) on January 25, 1995 was $1,627,884.69, which included interest and penalty, and the amount was growing each year.

On Jan. 25, 1995 IRS Agent Eugene Clark and M. Robert Ullman completed negotiation of an agreement whereby Ullman agreed to pay $600.00 per month until the end of the Collection Statute of Limitation date (CSED) of Feb. 4, 2001 (10 years from the last assessment of 2/4/91) with the following verbal provision: If the PBGC (Pension Benefit Guarantee Corp.) reduced his monthly pension, he

was entitled to reduce his monthly IRS payment by a like amount.

The total amount that could have been paid during the period from Jan. 25, 1995 to Feb. 4, 2001 (73 months) was $43,800.00

The IRS agent dictated the terms, amount and provisions and wrote the 433D Agreement which both parties signed.

Originally both parties expected the PBGC to make their final determination within 2 years. Prior to signing, Agent Clarke wrote into the agreement the additional condition, "Agreement will be re-evaluated on or about 1-27-97" and pointed out other existing provisions of the agreement.

"This agreement is based upon your current financial circumstances. It is subject to revision or termination of subsequent financial information required by IRS reflects a change in your ability to pay."

Both parties agree that the CSED (10-year Statute of Limitation) for the period ending Dec. 31, 1988, assessed on October 23,1989 in the amount of $950,256.88 expired on October 23, 1999.

The 433D agreement, signed on Jan. 25, 1995, included the entire amount as one figure.

Ullman continually made the monthly payment of $600.00.

On March 10, 2000, the PBGC (Pension Benefit Guarantee Corp.) made their final determination to reduce the Ullmans' monthly pension from $1,016.04 to $641.00, a

reduction of $374.00.

Ullman immediately requested the IRS to allow him to reduce his $600.00 payment to $225.40 (a $374.00 reduction).

The IRS refused to allow the reduction.

Beginning on May 25, 2000 Ullman reduced his monthly check from $600.00 to $225.40 and continued to send this amount until January 25, 2001 when the United States initiated the one-count complaint. The CSED (Statute of Limitation date) for the $45,651.51 was February 4,2001.

Ullman deducted a total of $3,366.00 over that period (ending Feb. 4, 2001).

The United States has argued that the 433D agreement signed on Jan. 25, 1995 was an Installment Agreement, thus requiring full payment in accordance with 26, U.S.C. 6159. (Exhibit 1)

Ullman has argued that the 433D Agreement was not an Installment Agreement as full payment was never a possibility, as $600.00 per month for 37 months could not possibly pay a debt of $1,627,000, increasing at the rate of at least $65,000 per year. It was very similar to an Offer in Compromise under **#26-USC 7122**.

The action brought by the United States included only the second portion ($45,651.51) as the first portion ($950,250.00) has expired on Oct. 21, 1999, prior to any PBGC reduction.

In the U. S. Motion for Summary Judgment (2/11/02), the United States wrote:

A. "The party seeking Summary Judgment bears the initial responsibility of demonstrating the absence of any genuine issue of material fact." and

B. #26 CPR #301-6519. Thus an installment Agreement differs from an Offer in Compromise Agreement where the taxpayer and the Internal Revenue Service each surrender rights in order to terminate a tax dispute. The written Installment Agreement involves no surrender of rights by the taxpayer; the taxpayer gains a one-sided advantage by postponement of overdue taxes, but must fully pay the taxes over time."

Ullman, in his answer to the U. S. Motion for Summary Judgment, wrote, "If, as the government claims, an Installment Agreement is only accepted if it provides, over time, full payment, then surely the 433D Agreement cannot be considered, by law, to be such an agreement.

Ullman brought a counterclaim action on February 8, 2001 alleging unauthorized collection activity in violation of 26 USC #7433.

On May 8, 2002 the U. S. District Court ruled, "Therefore, because of the lack of supporting evidence suggesting that the January 25, 1995 agreement was actually an Offer in Compromise and the evidence which establishes that the document was indeed an Installment Agreement, the court holds that the document signed by Ullman on January 25, 1995 was an Installment Agreement."

"To the extent that Ullman argues that the IRS refusal to accept Ullman's Offer In Compromise is an unauthorized collection activity, Ullman's argument fails. Compromising tax liability is a purely discretionary activity and will not give rise to a claim for intentional, reckless or negligent violation

of the Internal Revenue Code."

It must be noted that the terms of the 433D Agreement signed on Jan 25, 1995 were dictated by the Revenue Agent and it was clearly understood by both parties that:

1. $600.00 a month could not possibly pay a debt of $1.6 million in 37 months (or even in an infinite period).

2. A reduction in the PBGC payments would allow Ullman to make a similar reduction.

The IRS has never provided any testimony (sworn to or not) from Agent Clarke which refuted Ullman's claim regarding the terms of the agreement.

M. Robert Ullman appealed the District Court decision to the United States Court of Appeals for the Third District on July 15, 2002.

On Jan. 28, 2003 the Court of Appeals affirmed the decision by the District Court. The court refused to consider the substantial and compelling evidence submitted by M. Robert Ullman regarding:

A. the agreement signed on Jan. 25, 1995 by Agent Eugene Clarke

B. the legal qualifications of an Installment Agreement.

Ullman has argued that the legal definition of an Installment Agreement covered under USC 6159 requires "payment in full" and is an issue of material fact, a fact that is significant or essential to the issue at hand, and supports his

argument that there are genuine issues and that the decision by the District Court, confirmed by the U. S. Court of Appeals, in approving the United States Motion for Summary Judgment, violated his Constitutional rights (Amendment VII) for a jury trial which would have enabled him to present his case, including the issue of 26 U.S.C. 6159. The IRS broke both a written and oral agreement and by doing so, intentionally, recklessly violated the IRS code in collecting taxes.

In simple terms, one may call a giraffe a cow, but if it does not look like a cow or moo like a cow, or give milk like a cow, it certainly can't be a cow. An Installment Agreement can be called an Installment Agreement under U.S.C. 6159 if, and only if, it provides for full payment prior to the end of its statutory (CSED) period.